COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

SCHREIBER AND ASSOCIATES P.C. and S&A SERVICES OF WATERTOWN, Ltd. 99 Rosewood Drive Danvers, Massachusetts 01923, and Petitioners, v. CTC COMMUNICATIONS 220 Bear Hill Road Waltham, Massachusetts 02451 Respondent.	)	D.T.E. 02-86

REPLY BRIEF OF SCHREIBER AND ASSOCIATES, P.C. AND S&A SERVICES OF WATERTOWN LTD. REGARDING DEPARTMENT JURISDICTION

CTC Communications ("CTC") makes four arguments in response to the Department's briefing questions. They are: (1) Schreiber's complaint is vague and ambiguous; (2) the Department should decline to hear this matter because CTC has sued Schreiber in Federal District Court, which is the appropriate forum for resolution of what CTC characterizes as a collections case; (3) the Department has a longstanding practice of "failing to accept" jurisdiction over similar disputes; and (4) dismissing the Complaint will conserve scarce resources, which will benefit all parties. Not one of these arguments establishes that the Department does not have jurisdiction over disputes between a telephone carrier and a commercial customer. They appear to concede that the Department could assert jurisdiction over such disputes but that it would be better for the Department not to do so, as has been its past practice.

In fact, the considerations CTC relies on most heavily weigh strongly in favor of the Department deciding the issues that are within its primary jurisdiction. Doing so in this case would not cause the Department to depart from any past practice with respect to disputes that may be more accurately described as collections matters, (which this dispute is not), and would resolve questions that any court of competent jurisdiction would likely refer to the Department in any event. The argument that the Complaint is too vague and ambiguous should be addressed first, however, since it is more in the nature of a procedural matter that can be dismissed quickly.

I. The Complaint Meets the Department's Requirements of Notice Pleading and, Even If It Did Not, The Appropriate Remedy Would Be Amendment Or Supplementation Rather Than Dismissal.

CTC maintains that the Complaint is "so vague and ambiguous as to warrant dismissal solely on the ground that it is virtually impossible to ascertain the basis of Schreiber's concerns," and that the allegations in the complaint "omit references supporting the factual predicate for Schreiber's complaints about CTC's service . . ." CTC Brief at 7. CTC seeks a level of detail in pleading far beyond that which is required by the Department's regulations. Those regulations describe the general form of initial pleadings to the Department, including complaints:

> Content. Every initial pleading shall be on the form provided by the Department, and if no form is provided, the pleading, as far as possible, shall contain the following:
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> 1. A title which indicates either the nature of the proceedings or the parties involved therein.
>
> 2. The complete name and address of the party filing the pleading.
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> 3. If the party filing the pleading is represented by counsel, the name and address of the attorney.
>
> 4. The name and address of all other petitioners.
>
> 5. A clear and concise statement of the facts upon which the pleading is maintained.
>
> . . .
>
> 7. A reference to the statute under which relief is sought.

8. A prayer setting forth the relief sought.[1]

220 CMR 1.04(1)(b).

Schreiber's complaint contains each of these elements, which are similar to the notice pleadings requirements of the Massachusetts Rules of Civil Procedure. *See, e.g.,* MRCP 8(a) ("A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief, and (2) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.")[2] The further detail CTC seeks (for example, the specific dates of outages) are more appropriate for the discovery and hearing phase of a proceeding than an initial pleading.

CTC is also incredulous and outraged at one element of relief sought by Schreiber, namely that the parties' Agreement be declared null and void. These emotions are based on a particular view of the facts rather than on the scope of the Department's jurisdiction, and they do not justify dismissal of the Complaint. If incredulity and outrage were sufficient grounds for dismissal, few actions would survive the initial pleading stage.

The issues raised by the Department in the briefing questions should not turn on the points that have so raised CTC's ire. For purposes of a motion to dismiss, the allegations of the Complaint must be taken as true, and the Complaint clearly states that there were outages caused by CTC's inability to provide the type of services promised in the customer agreement and its tariff. The Department's jurisdiction over this dispute cannot depend on whether the Complaint

[1] 220 CMR 1.04(b)(6), which has been omitted, applies only to appellate proceedings.

[2] While the Department has not adopted the Rules of Civil Procedure, they can provide useful models for analogous matters of administrative procedure. *Cambridge Electric Light Company*, DPU 94-101/95-36 (September 28, 1995).

states the specific dates the outages occurred and, if it did, it would be a simple matter for Schreiber to amend its complaint to add those facts.

Similarly, the Department's jurisdiction will not depend on whether one remedy or another is available, but whether the Department may fashion **any** remedy or take **any** action should Schreiber prove the facts alleged in its Complaint. On this point, additional detail in pleading may be helpful, though Schreiber does not believe it is required by the Department's procedural rules. Thus, Schreiber describes in more detail below the tariff sections implicated by CTC's actions and the issues with respect to those tariff sections that the Department should address. Schreiber asks that the Department treat this further detail, (for purposes of resolving the jurisdictional issue only), as though pleaded in complaint form to avoid the procedural step of filing an amended complaint *instanter*. (Schreiber acknowledges that allowing CTC to respond to the jurisdictional impact of these tariff issues would be appropriate.)

II. Judicial and Administrative Economy and the Doctrine of Primary Jurisdiction Dictate that the Department Investigate and Resolve the Matters Raised by the Complaint.

CTC believes that the dispute between it and Schreiber should be resolved in court. To that end, CTC brought an action against Schreiber in Federal District Court, nearly two months after Schreiber filed its Complaint with the Department. A court action, however, will not obviate the need for Department review of CTC's practices due to the presence in this case of issues that are within the Department's primary jurisdiction. CTC's desire to focus exclusively on a judicial remedy will result in an inefficient use of its own and others' resources.

Schreiber's Complaint raises at least two matters that are within the Department's primary jurisdiction: (1) the appropriate interpretation and application of CTC's Massachusetts tariff, and (2) the ongoing ability of CTC to provide the intrastate telecommunications services

that, through its tariffs and other means, it claims to be able to provide. Both issues involve matters that any court will look to the Department to resolve, after which there might be little left to be resolved through an expensive court battle.

The Complaint raises at least five issues of tariff interpretation:

1. **Allowances for interruptions in service** – CTC's tariff makes certain allowances for interruptions in service. M.D.T.E. No. 3 at Section 2.6. There are factual and legal issues regarding the appropriate amount of allowances for interruptions in service that should have been given to Schreiber under CTC's Massachusetts tariff.
2. **Cancellation for service interruption** – CTC's tariff provides that the service provided by a particular service can be terminated or cancelled "if any circuit experiences a single continuous outage of 8 hours or more or cumulative service credits equaling 16 hours in a continuous 12-month period." M.D.T.E. No. 3 at Section 2.6.3. Schreiber believes that this section may apply to one or more circuits provided to it by CTC.
3. **Application of termination fees** – Fees for early termination of Schreiber's service account for a significant portion of the amount CTC claims is outstanding. *See, e.g.*, M.D.T.E. No. 3 at Sections 2.9 and 2.13.4.D. Whether the circumstances of the dealings between Schreiber and CTC allow the application of termination fees and, more broadly, whether the termination fees are just and reasonable are factual and legal questions raised by Schreiber's complaint that are squarely within the Department's technical expertise and statutory jurisdiction.
4. **Limitation of liability** – CTC's tariff contains provisions limiting its liability for service failures. M.D.T.E. No. 3 at Section 2.1.5. Whether these provisions are just and reasonable and, if so, whether any of the facts related to CTC's performance are sufficient to overcome

these provisions are significant issues of tariff interpretation that will have an impact on the resolution of the dispute between Schreiber and CTC.

5. **Notice of disputed bills** – CTC's tariff provides that customers should provide notice of disputed items on an invoice "in accordance with M.D.P.U. 18448, Rules and Practices Relating to Telephone Service to Residential Customers." M.D.T.E. No. 3 at Section 2.12. Schreiber's complaint and CTC's response raise factual and legal issues regarding whether Schreiber's communications with CTC regarding disputed amounts were in substantial compliance with the provisions of M.D.P.U. 18448.

In addition to these specific issues of tariff application and interpretation, the Complaint raises broader issues related to the manner in which the Department oversees and supervises CLECs. As discussed in Schreiber's initial response to the Department's briefing questions, the Department has grappled on an *ad hoc* basis with the question of how it can protect CLEC customers in various circumstances that were not present when an integrated monopoly provided essentially all intrastate telecommunications services. It could be that the Department will eventually determine that Schreiber is entitled to no specific relief from the Department, other than resolution of disputed tariff sections. Nonetheless, the Department would be unable to fulfill its statutory mandate to supervise telephone carriers doing business in Massachusetts if it simply ignored the operation of those carriers with respect to non-residential customers. Schreiber's Complaint requires the Department to consider how it would otherwise become aware of and investigate technical and operational problems experienced by CLECs serving mainly business customers if it did not act on such complaints, so long as they go beyond mere billing issues. The Department cannot abdicate its statutory responsibility to supervise competitive carriers solely because a business customer rather than a residential customer brings

a problem to the Department's attention. Deciding this important question of the nature and scope of the Department's oversight of CLECs is also a matter within the Department's primary jurisdiction.

Both the issues of tariff interpretation and application and those relating to the Department's oversight of CLECs are within the Department's technical expertise and explicit statutory mandate, and any court in which CTC might bring an action would defer to the Department's view on these matters. For example, in *Spence v. Boston Edison Co.*, 390 Mass. 604, 459 N.E.2d 80 (1983), the Supreme Judicial Court found that in certain circumstances, (e.g., the mere calculation of a bill), courts can resolve disputes over utility bills. But where the validity of a tariff itself is at issue, or where the parties disagree about how a tariff provision would apply to the particular facts of the case, the dispute must be resolved by the Department. "[W]here words in a tariff are used in a peculiar or technical sense, and where extrinsic evidence is necessary to determine their meaning or proper application, so 'the enquiry is essentially one of fact and of discretion in technical matters,' then the issue of tariff application must first go to the Commission." *Spence*, 390 Mass. at 613, citing *United States v. Western Pacific R.R.*, 352 U.S. 59, 66, 77 S. Ct. 161, L. Ed. 2d 126 (1956), (internal citation omitted). In this case, there is both a dispute regarding the validity of certain provisions of CTC's tariff (e.g. the termination liability provisions) and a dispute regarding the application of various tariff sections to the peculiar facts of the case. These matters must be heard first by the Department, not a court.

The Federal courts also recognize that administrative agencies should decide matters that are within their technical expertise. In *New England Legal Foundation v. Massachusetts Port Authority*, 883 F.2d 157 (1st Cir. 1989), the First Circuit identified the three factors a court should consider in determining whether to defer to an administrative agency's determination of a

particular issue: "(1) whether the agency determination lay at the heart of the task assigned the agency by Congress; (2) whether agency expertise was required to unravel intricate, technical facts; and (3) whether, though perhaps not determinative, the agency determination would materially aid the court." *New England Legal Foundation*, 883 F.2d at 172, citing *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 580-81 (1st Cir. 1979). In that case, the First Circuit went on to hold that the Department of Transportation had primary jurisdiction over the issue of whether landing fees charged at Logan Airport violated the Federal Aviation Act.

Here the matters of contract interpretation and application and Department oversight of CLECs easily meet the three-part test set forth in the *New England Legal Foundation* case. First, through several provisions of Chapter 159, the Legislature assigned the Department the task of overseeing the rates, charges, practices, regulations, equipment, and services of telephone carriers in the Commonwealth. *See, e.g.*, G.L. c. 159, §§ 10, 12, 13, 14, and 16. In this case, Schreiber alleges that (1) CTC has not provided the services and equipment as described in its tariff; (2) certain sections of CTC's tariff may be invalid; (3) certain sections of CTC's tariff may operate to relieve Schreiber of any obligation to pay certain of the amounts sought by CTC; and (4) CTC's inability to provide certain services as promised and as described in its tariff calls into question CTC's compliance with the requirements attending its certification as a competitive telecommunications carrier in Massachusetts. The Department's investigation and resolution of these allegations "lay at the very heart of the task assigned" by the Legislature to the Department, namely comprehensive oversight of telecommunications carriers in Massachusetts.

Second, the Complaint raises technical issues regarding complex telecommunications service that will require the Department's expertise to unravel. Schreiber operates several sophisticated call centers, and CTC claimed to be able to provide the telecommunications service

necessary to support those call centers. Determining whether CTC provided those services in compliance with its tariff and, if not, what is the appropriate remedy will require in-house technical expertise that a court does not possess. The Department does have that expertise and should bring it to bear on the matters raised by the Complaint.

Finally, while the Department's consideration of the Complaint may not be determinative, it would aid the court in any subsequent action in two ways. First, the Department's action would likely dispose of a number of key issues in the dispute between Schreiber and CTC. For example, the validity of the termination fees CTC is seeking to impose against Schreiber and the validity of the CTC tariff's limitation of liability provisions would not have to be re-litigated in a subsequent court action by either party. Resolving these two issues, which would require the Department's technical expertise, would narrow greatly the issues that a court would have to consider.

Second, with respect to issues not resolved by the Department, the technical analysis provided by the Department in the course of its adjudication of the complaint would be invaluable for a later action before a court, which lacks its own technical staff. As the First Circuit found in the *New England Legal Foundation* case, "having the benefit of a fully developed record and a detailed analysis of the evidence by both the ALJ and the Secretary has certainly been of incalculable aid in unraveling intricate, technical facts." *New England Legal Foundation*, 883 F.2d at 173. The same would be true here. Complex telecommunications services are beyond the expertise of even experienced trial courts, and a central part of the Department's role is to provide that expertise when it is lacking in other forums.

CTC itself has recognized the Department's primary jurisdiction with respect to one of the issues raised by Schreiber in its Complaint. In *CTC Communications*, DTE 98-18 (Orders

issued July 2, 1998 and July 24, 1998; Complaint withdrawn March 25, 1999), CTC sought a finding that Bell Atlantic-Massachusetts' imposition of termination fees on business customers seeking to assign their Bell Atlantic customer agreements to CTC violated Massachusetts contract law and CTC's resale agreement with Bell Atlantic. Despite the fact that CTC's complaint was based to a great extent on Massachusetts common law of contract, CTC did not go to court first but, rather, invoked the Department's jurisdiction in order to make use of the Department's technical expertise in telecommunications matters. CTC clearly did not take this course of action because of an aversion to civil litigation. *See, e.g., CTC Communications Corp. v. Bell Atlantic Corporation*, 77 F. Supp. 124 (D. Me. 1999). Rather, CTC recognized that some matters (such as termination fees in a telecommunications carrier's tariff) should be brought before the Department while other issues (such as the antitrust claims CTC raised in its action in Federal District Court in Maine) should be brought in court.

The dispute between Schreiber and CTC should be heard first by the Department in order to resolve the many issues that are within the Department's primary jurisdiction. CTC's desire to be in court stems from its simplistic view of this case as a collections matter. It is clearly more than that, and treating the case as a simple collections matter will only result in greater expense and delay as whatever court CTC brings its action in comes to that conclusion itself, and refers the case to the Department for resolution.[3]

[3] Indeed, recent events have already shown that the case is not a simple one from a jurisdictional perspective. CTC sued Schreiber in Federal District Court for the District of Massachusetts, invoking that court's Federal question jurisdiction pursuant to 28 U.S.C. § 1331, on the grounds that the services CTC provided to Schreiber were provided subject to a tariff filed with the Federal Communications Commission. CTC, however, cited only the services provided pursuant to its Massachusetts tariff, M.D.T.E. No. 3, not an FCC tariff. Schreiber has, thus, moved to dismiss that action for want of subject matter jurisdiction. (The parties are not diverse, both Schreiber & Associates, P.C. and CTC being citizens of Massachusetts for jurisdictional purposes.)

III. Hearing This Case Will Not Compromise The Department's Policy Of Declining To Hear Routine Billing Disputes Between Commercial Customers And Their Telecommunications Carriers.

As discussed at length in Schreiber's initial responses, the Department's policy with respect to consumer adjudications is a reasonable one. Commercial customers are, generally, more sophisticated than residential customers, and have more bargaining power with their carriers. There is no need to make the Department a way station through which every niggling business dispute must pass on its way to court. The *Teleprocessing* case is a valid expression of the Department's legitimate desire to avoid squandering its resources in such pursuits.

But this case is nothing like *Teleprocessing*, as shown at length above and in Schreiber's initial response. If this case were merely a billing dispute, or a collections case, as CTC alleges, it should be dismissed by the Department and heard in court, as the Supreme Judicial Court suggested in *Spence v. Boston Edison Co.*, *supra*. In this respect, the Department's historical practice is entirely consistent with the judicial view of agency jurisdiction; cases in which there are no issues requiring the agency's expertise can be heard by a court. Cases like this one, however, which involve issues of tariff interpretation and application, and the broader issue of Department oversight of CLEC operations, are squarely within the Department's primary jurisdiction. Addressing these issues will not open the Department to a flood of new cases, as only a handful can meet the criteria established in the *Spence* and *New England Legal Foundation* cases.

IV. The Department Should Not Decline to Exercise Its Jurisdiction Because CTC's Resources Are Scarce.

CTC maintains that the Department should "decline to accept jurisdiction over the Complaint in the interest of conserving the scarce resources of the Department and the parties." CTC Brief at 10. CTC provides no citation for the "scarce resources" exception for matters that

are within the Department's primary jurisdiction. Moreover, as discussed above, the Department's consideration of the matters within its primary jurisdiction will ultimately save resources, as any court will eventually look to the Department to resolve those issues. Indeed, if CTC had not (1) opposed the Department's jurisdiction in this case, and (2) filed a subsequent action in a court without jurisdiction over the services provided pursuant to M.D.T.E. No. 3, the Department might already have resolved the matters that are central to the dispute between Schreiber and CTC. There is little question that it would be cheaper and faster to have the Department consider the tariff interpretation and application issues raised by the Complaint than to litigate those issues in civil court.

V. The Department Has No Jurisdiction Over Services Provided in New York.

The Hearing Officer's April 1, 2003 memorandum asked the parties to address "whether, and to what extent, the Department has jurisdiction over the provision of telecommunications services provided to the Complainant's call centers located in New York." Schreiber does not believe the Department has jurisdiction over intrastate services provided in another state. The Department's jurisdiction pursuant to Chapter 159 is limited to telecommunications services "when furnished or rendered for public use within the commonwealth." G.L. c. 159, § 12. Schreiber's complaint was not meant to address services provided outside the Commonwealth. The operator of Schreiber's New York call center, S&A Services of Watertown, Ltd., was included in the Complaint because it is possible that certain intrastate services provided to Schreiber's call center in Massachusetts were actually provided to that entity.

CONCLUSION

The Department is right to be concerned about unnecessarily expanding the scope of its jurisdiction. Schreiber is hopeful that its responses to the Department's briefing questions have

clarified the nature of the Department's jurisdiction over this dispute, and reassured the Department that it does not seek such an expansion. Rather, Schreiber asks the Department to address issues of tariff interpretation and application that must be answered in order to resolve the dispute between Schreiber and CTC. The Department is the right entity to address such issues. Further, the Department is the only entity that can oversee the operation of CLECs doing business in the Commonwealth, and complaints such as Schreiber's may be the only means by which the Department can be made aware of potential problems experienced by CLECs serving business customers. When such complaints are no more than billing disputes, the Department should decline to act, as has been its practice. When such complaints go beyond mere billing disputes and raise issues of tariff interpretation or legitimate questions about CLECs practices, the Department should act.

Dated this 8th day of April, 2003.

Respectfully submitted,

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